In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 328

THE UNITED STATES, PETITIONER

v.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in this cause on December 2, 1935, motions for a new trial and amendment of findings being denied on June 1, 1936. This is a cross-petition for a writ of certiorari, the petition on behalf of the Shoshone Indians having been filed on July 22, 1936, as No. 216.

OPINION BELOW

The opinion of the Court of Claims (R. 69–97) has not yet been reported. Its memorandum and order overruling motions for a new trial and amendment of findings appears at R. 98–100.

JURISDICTION

The judgment of the Court of Claims was entered December 2, 1935 (R. 97). Motions for a new trial and amendment of findings were denied June 1, 1936 (R. 98). The jurisdiction of this Court is invoked under Section 1 of the Act of March 3, 1927, c. 302, 44 Stat., Part 2, p. 1349, and Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (U. S. C., Title 28, Section 288).

QUESTIONS PRESENTED

1. Whether the Shoshone Tribe of Indians, who had been placed upon a reservation set apart for them under the Treaty of 1868, suffered a permanent taking of their right to the exclusive use and occupancy of the reservation when the United States Government in 1878 placed the Northern Arapahoe Indians thereon without the consent of the Shoshones and continually thereafter kept them there over the objection and protest of the Shoshones.

2. Whether the Act of March 3, 1883, granted to the Shoshone Tribe rights additional to those granted them in the Treaty of 1868.

TREATY AND STATUTES INVOLVED

The pertinent portions of the Treaty of July 3, 1868, 15 Stat. 673, with the Shoshone tribe are printed at R. 32–36. The pertinent portion of the Act of March 3, 1883, c. 141, 22 Stat. 582, 590 (U. S. C., Title 25, Sec. 155), is printed at R. 79.

The Jurisdictional Act of March 3, 1927, c. 302, 44 Stat., Part 2, p. 1349, is printed at R. 1–3.

STATEMENT

The pertinent facts, as established by the findings of the Court of Claims, are as follows:

In 1868 a treaty was entered into between the United States and the Shoshone Tribe of Indians (R. 32–36). Under Article 2 thereof it was agreed that a specified body of land, now within the State of Wyoming, should be and was thereby

> * * * set apart for the absolute and undisturbed use and occupation of the Shoshone Indians * * *, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them * * *

The Shoshones immediately thereafter went upon the land so designated and have since remained there (R. 36).

About October 1, 1877, a delegation of Sioux and Arapahoe Indians called upon the Commissioner of Indian Affairs and the President to discuss the matter of their location upon some reservation. One Irwin, who had been an agent at the Shoshone reservation but who was then the agent having supervision over the Northern Arapahoes, was present (R. 43–44). After the discussion of this matter with the Indians, and on October 4, 1877, the Commissioner of Indian

Affairs requested the Secretary of the Interior that Irwin

> * * * be authorized to proceed to the Shoshone Reservation in Wyoming and consult with the Indians there, with the intent to gain their consent to permit the Arapahoes (now at Red Cloud Agency) to remove to their (the Shoshone) reservation, both tribes to be under the control of one agent (R. 44).

Thereupon Irwin was authorized and directed to proceed at once to the Shoshone Reservation and consult with the Indians there, with the intent of gaining their consent to the placing thereon of the Northern Arapahoes (hereafter called the Arapahoes), both tribes to be under one agent, and with instruction to represent to them the advantage of having a friendly neighboring tribe associated with them, and to present such arguments as would obtain their ready consent to the proposed arrangement (R. 44). Agent Irwin proceeded to the Shoshone Reservation (R. 44), and, after a council upon the subject with them and their chief, sent a telegram to the Commissioner of Indian Affairs at Washington, dated Cheyenne, Wyoming, October 17, 1877, as follows (R. 44–45):

> I returned from Shoshone Agency today. Held council and made peace between Shoshones and Arapahoes.

The Annual Report of the Commissioner of Indian Affairs, dated November 1, 1877, stated in

substance that pursuant to their request on their recent visit to Washington permission had been given the Arapahoes to join the Shoshones on the latter tribe's reservation, and that in a formal council held by Agent Irwin with the Shoshones their consent to the arrangement desired by the Arapahoes was obtained, and the removal of the Arapahoes was then in progress (R. 74).

By April of 1878, most of the Arapahoes had been placed upon the Shoshone Reservation (R. 48). The Arapahoes thereafter remained on the reservation and used and occupied it equally with the Shoshones. They engaged in farming thereon and received the benefit of all its facilities equally with the Shoshones (R. 50).

The findings of fact and the opinion of the court below indicate that neither at the time of the council with Irwin nor at any other time did the Shoshones consent to admit the Arapahoes amongst them as permanent occupants of their reservation (R. 47–50, 70). The agent of the Shoshone Reservation made many reports prior to 1891, to the effect that the Shoshones claimed that the Arapahoes were wrongfully upon the reservation. No action was taken by the Interior Department upon these reports (R. 49–50).

Prior to August 13, 1891, a Commission known as the Woodruff Commission was sent to negotiate, on behalf of the United States, with the Indians of the Shoshone Reservation for a cession of such part thereof as the Indians would cede. On Au-

gust 5, 1891, the Chairman of the Commission wrote to the Commissioner of Indian Affairs asking for instructions because of the denial by the Shoshones that the Arapahoes had any rights in or upon the reservation (R. 50). In reply the Commissioner of Indian Affairs on August 13, 1891, advised the Commission that

> This office holds * * * that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding (R. 50).

Subsequently, by agreement of April 21, 1896, approved June 7, 1897, c. 3, 30 Stat. 62, 93, the Shoshones and Arapahoes ceded to the United States 55,040 acres of the reservation for a consideration of $60,000. Again on April 21, 1904, by an agreement approved March 3, 1905, c. 1452, 33 Stat. 1016, the Shoshones and Arapahoes ceded to the United States a tract of the reservation containing 1,480,000 acres, the United States agreeing to dispose of the same for the account of the Indians occupying the reservation. Each of these agreements contained a stipulation to the effect that nothing therein should be construed to deprive the Indians of any annuities or benefits to which they were entitled under existing agreements or treaty stipulations. After the foregoing cessions had been made the diminished reservation contained 808,500 acres (R. 52–53).

The Shoshone Indians brought suit against the United States in the Court of Claims under the Jurisdictional Act of March 3, 1927, for damages arising out of the placing of the Arapahoes upon the Shoshone tribe's reservation. The Court of Claims held that the Government took an undivided one-half interest in all property and property rights of the Shoshones in the reservation as of August 13, 1891, when the Commissioner of Indian Affairs "definitely held that 'the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones'" (R. 75). The court found that the fair and reasonable value of an undivided one-half interest of the Shoshone reservation on August 13, 1891, was $2,050,579.50 (R. 53), or $1.75 per acre (R. 79). The findings and the opinion show that this finding of value was based upon the facts that "It was known in 1891 that the Shoshone Reservation contained a large, but undetermined, quantity of coal, oil, and gas, phosphate and gypsum," (R. 53) and because the reservation contained a large area of fine grazing land from which considerable revenue was derived from grazing leases and also because it contained a large stand of excellent timber (R. 38–39, 79). The opinion discloses that the court deemed these elements of importance in determining the value of the land in 1891, because of the Act of March 3, 1883, which provided that "The proceeds of all pasturage and sales of timber, coal, or other product of any Indian

reservation, * * *, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe" (R. 79). The court, as its opinion shows, regarded this Act as conferring upon the Shoshones the beneficial right to all the net proceeds derived from the sales of timber and other products of the reservation (R. 81), a right additional to that of absolute and undisturbed use and occupation of the reservation guaranteed to the Shoshone tribe by the Treaty of 1868.

The court further held that during the period between 1878 and 1891, the Government maintained the Arapahoes on the Shoshone's reservation without their consent, that during this time no action was taken by the Government which gave the Arapahoes any rights to or upon the reservation, that there thus occurred a violation of Article 2 of the Treaty with the Shoshones of 1868, and that there thereby resulted benefits to the Government and damages to the Shoshones (R. 81–82). The court found that the fair and reasonable value of the use and occupancy of an undivided one-half of the Shoshone reservation by the Arapahoes between 1878 and 1891 was $332,475.00 (R. 53). It arrived at this figure by determining that the average annual population of the Arapahoe tribe on the reservation between 1878 and 1891 was 1,023, and that an allowance should be made to the Sho-

shones of $25.00 a year for each of these Indians during the thirteen year period (R. 82).

As a result of these and other items not here involved the court found that the Shoshone tribe was entitled to recover $2,483,467.99, against which, however, the Government was entitled to an offset of $1,689,646.50, leaving a balance of $793,821.49, for which the court entered a judgment for the Shoshones (R. 97).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that there was a "taking" by the Government of an undivided one-half interest in the Shoshone reservation for the benefit of the Arapahoes when the Commissioner of Indian Affairs on August 13, 1891, advised the Woodruff Commission that the Arapahoes had equal rights in the reservation which did not depend upon the further consent of the Shoshones.

2. In not holding that the "taking" occurred in 1878 when the Arapahoes were removed by the Government to the Shoshone reservation without the consent of the Shoshones and thereafter maintained there over the continued objection and protest of the Shoshones.

3. In holding that the Act of March 3, 1883, granted the Shoshones an interest in and to the reservation in addition to those interests which were granted by the Treaty of 1868.

REASONS FOR GRANTING THE WRIT

1. By the Treaty of 1868 the Shoshone Reservation was "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians * * *, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." The findings and opinion of the Court of Claims show that the Arapahoes were placed by the Government on the Shoshone reservation in 1878 without the consent of the Shoshones (except for a brief temporary period), and were thereafter continually kept there over the objection and protest of the Shoshones. The fact that the Arapahoes were removed to the Shoshone reservation upon the mistaken assumption that the consent of the Shoshones had been obtained or the fact that the Indians may have understood that provision would later be made for a separate reservation for the Arapahoes (R. 76) does not alter the situation that there is nothing in the findings or the opinion below from which the conclusion can be deduced that the Arapahoes were placed on the Shoshone reservation for any mere temporary purpose. Those in charge of Indian Affairs thought they had the consent of the Shoshones to the removal of the Arapahoes for permanent settlement and they thereafter continually kept the Arapahoes upon the reservation despite the repeated objections and protests of the Shoshones.

The so-called ruling of the Commissioner of Indian Affairs of August 13, 1891, which the court below held constituted the taking, did not alter what had become a *fait accompli*. That merely announced that the Woodruff Commission in treating with the Indians for a cession of a part of the reservation were entitled to treat with both the Shoshones and the Arapahoes "as the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones" (R. 50). It did not purport to "take" any interest of the Shoshones. That had already been accomplished. Although based upon a mistaken assumption, it was merely a declaration that the Arapahoes had already acquired equal rights in the reservation. The permanent deprivation of the Shoshones' right to the exclusive use and occupancy of their reservation occurred when the Government, believing it was proceeding in accordance with the treaty, removed the Arapahoes to the Shoshone reservation and thereafter kept them there despite the persistent protest and objection of the Shoshones. From the standpoint of a "taking" the pronouncement of August 13, 1891, certainly had no greater efficacy than did the erroneous statement referred to in the opinion below (R. 74), which the Commissioner of Indian Affairs made in his Annual Report of November 1, 1877, prior to the removal of the Arapahoes to the Shoshone reservation, to the ef-

fect that the consent of the Shoshones to the Arapahoes' removal had been obtained at the council held by Agent Irwin with the Shoshones in October, 1877 (R. 45). The only conceivable bearing that either of these statements could have on the case would be one which obviously supports the Government's position, i. e., a recognition that the removal of the Arapahoes to the Shoshone reservation which had been or was to be accomplished was one not for some mere temporary purpose but one which was permanent in character because based supposedly upon the consent which had been given by the Shoshones in accordance with their treaty. That Congress was aware that the Arapahoes were permanently located on the Shoshone Reservation prior to 1891 is shown by the fact that in many Acts passed prior to that year it made appropriations for uses of a permanent nature "for the Northern Cheyennes and Arapahoes in Wyoming and on the Tongue River in Montana."[1] The Arapahoes on the Wind River Reservation were the only Arapahoes in Wyoming. The "taking", we submit, occurred when the Government in 1878, without the consent of the Shoshones, removed the Arapahoes to their reservation for permanent oc-

[1] See the Acts of July 4, 1884, c. 180, 23 Stat. 76, 82; March 3, 1885, c. 341, 23 Stat. 362, 369; May 15, 1886, c. 333, 24 Stat. 29, 35; March 2, 1887, c. 320, 24 Stat. 449, 455; June 28, 1888, c. 503, 25 Stat. 217, 223; March 2, 1889, c. 412, 25 Stat. 980, 987; August 19, 1890, c. 807, 26 Stat. 336, 343; March 3, 1891, c. 543, 26 Stat. 989, 996.

cupation and thereafter maintained them there over the repeated objection and protest of the Shoshones.

The question as to the date of taking is of particular importance in this case because of the utilization by the court below of the Act of March 3, 1883, in determining the measure of damages. That Act provided that "the proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation * * *, and not the result of the labor of any member of such tribe shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe * * *." If the taking occurred in 1878, as contended by the Government, it is admitted by the court below that the only title which the Shoshone Indians had to their reservation "consisted merely of the right to use and occupy the lands" (R. 81). In consequence the only damages to which the Shoshones would be entitled on account of the taking would be such as were measured solely by a deprivation of the right of use and occupancy. In holding, however, that the taking occurred in 1891, after the passage of the Act of 1883, the award of damages was greatly increased. The court construed the Act of 1883 as giving the Shoshones "the beneficial right to all net proceeds derived from the sales of timber and other products of the reservation" (R. 81; see also R. 79, 87, 88–89). In other words the court held that the Act gave the Shoshones practically a fee

simple title to the reservation. While we believe that this is an erroneous construction of the Act, as hereinafter pointed out, it resulted in an award to the Shoshones of $1.75 an acre or $2,050,597.50 (R. 79), an amount which conceivably could not have been allowed if the court had based its award of damages merely upon a deprivation of the bare right of use and occupancy of the reservation granted to the Shoshones by their treaty. A holding that the taking occurred in 1878, as we contend, would also obviously eliminate the item of damage of $332,475 which the court awarded as for a temporary use and occupancy of the reservation by the Arapahoes during the period between 1878 and 1891 (R. 81–82).

2. If this Court should be of the opinion that the taking occurred in 1891, as decided below, we submit that the Court of Claims misconstrued the Act of March 3, 1883, when it held that that Act conferred upon the Shoshones the beneficial ownership of the timber, oil, gas, etc., located within the reservation and, therefore, took into consideration these elements of value in awarding damages for the taking instead of confining itself to an ascertainment of the value of the only right guaranteed by the Treaty of 1868 of which the Shoshones were deprived, that is, the right to the exclusive use and occupancy of their reservation.

The Act of 1883 did not enhance or enlarge in any degree the ordinary Indian title of right of use and occupancy vested in the Shoshones by the

Treaty of 1868. It merely gave the Indians a prospective interest, as a gratuity, in the proceeds of the sale of the products referred to therein. It was not a recognition of any right of ownership of the Indians in or to any of such products, nor did Congress thereby convey or yield any right, title, or interest theretofore possessed by the United States, as the owner of the fee simple title to the reservation lands, in or to any of such products. To become operative, and for the Indians to receive any benefit under the Act, the removal and sale of the timber, oil, and other products covered by the Act became necessary. The Act did not authorize any such removal or sale. It merely directed the disposition of moneys derived from the sale of the timber and other products of the reservation after they had been severed from the soil under proper authority. As long as the property was attached to the soil, the Act had no effect. The timber and other products could not be severed from the soil without direct congressional authority. Until Congress gave authority for the removal and sale of the natural products of the reservation, they remained the property of the United States, subject to its right of removal and sale or other disposition. The court below points to no congressional authorization for the removal and sale of the products of the reservation prior to August 13, 1891, the date as of which it based the value of the interest taken. It follows, there-

fore, that the Act of 1883, standing by itself and in the absence of other legislation, gave the Shoshones no greater right in the timber, minerals, and other products of the reservation than they had under the Treaty of 1868. This right was only such right as was incident to the mere use and occupancy of the reservation by the Shoshones. In *United States* v. *Cook*, 19 Wall. 591 (decided at the October Term, 1873), this Court held that timber on an Indian reservation, the lands of which were held by a tribe under the usual Indian title of occupancy alone, as in the instant case, could be used by the tribe for that purpose only; that "If the timber should be severed for the purposes of sale alone—in other words, if the cutting of the timber was the principal thing and not the incident—then the cutting would be wrongful, and the timber, when cut, became the absolute property of the United States" (pp. 593–594); and that "What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more" (p. 594). A similar ruling was made in 1888 by the Attorney General in an opinion to the Secretary of the Interior on the question whether Indians occupying reservations, the fees to which were in the United States, had the right, in view of the *Cook* decision, to cut and sell for their use and benefit the dead timber, standing or down (19 Op. A. G. 194).

To remedy this situation, so far as dead timber, standing or fallen, was concerned, the Act of February 16, 1889, c. 172, 25 Stat. 673, was passed. This Act provided that the President might from year to year in his discretion, under such regulations as he might prescribe, authorize the Indians residing on reservations or allotments, the fees to which remained in the United States, to fell, cut, remove, sell, or to otherwise dispose of the dead timber, standing or fallen, on such reservation or allotment, for the sole benefit of the Indian or Indians performing the labor. This Act, it will be observed, did not authorize the utilization of the proceeds of sale for the benefit of the tribe as a whole. It was a consent by the Government, the remainderman, that individual members of the life tenant (the tribe) might remove and sell the dead timber, notwithstanding such removal would otherwise result in waste. It was, moreover, a clear recognition of the principle that in the absence of specific congressional authorization an Indian tribe having only the bare right of use and occupancy of a reservation is not entitled to sever and dispose of the timber and other natural products of the reservation except as this may be incident to the right of use and occupation. Obviously, this Act is a direct refutation of the theory held by the court below that the Act of 1883 vested ownership in the tribe, as Congress could not legally give to an indi-

vidual of a tribe proceeds of property which belonged to the whole tribe.

Furthermore, in the case of *Pine River Logging Co.* v. *United States,* 186 U. S. 279, which was decided in 1902, more than nineteen years after the approval of the Act of 1883, and which involved contracts for the removal and sale of dead timber executed pursuant to the Act of 1889, *supra,* this Court, following the principle announced in the *Cook* case, held that "the Indians had no right to the timber upon this land other than to provide themselves with the necessary wood for their individual use, or to improve their land * * * *except so far as Congress chose to extend such right* * * *" (P. 290). [Italics ours.] While no reference is made in the decision to the Act of 1883, it is difficult to believe, if the construction of the Act given by the court below be correct, that an Act having such material bearing on the litigation would have escaped the attention of both court and counsel.

The question whether the Act of 1883 changed the character of an Indian tribe's title to a reservation is obviously one of great importance, as it seriously affects the measure of damages in pending and future cases for any taking by the Government of land in an Indian reservation which occurred after the passage of the Act on March 3, 1883. The question was passed upon by the Court of Claims for the first time in this case and it seems

never heretofore to have been directly presented to this Court.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

SEPTEMBER 1936.

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